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No. 80-2150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD FINNEGAN, ET AL.,
Petitioners,

v.

HAROLD D. LEU, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF THE ASSOCIATION FOR UNION DEMOCRACY, THE NORTHWEST OHIO CHAPTER OF TEAMSTERS FOR A DEMOCRATIC UNION, THE UNITED CONSTRUCTION WORKERS ASSOCIATION, AND THE INDEPENDENT SKILLED TRADES COUNCIL, AS *AMICI CURIAE*

ALAN HYDE
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY SCHOOL OF LAW
15 Washington Street
Newark, New Jersey 07102
(201) 648-5463

PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION OF THE ASSOCIATION FOR UNION DEMOCRACY, THE NORTHWEST OHIO CHAPTER OF TEAMSTERS FOR A DEMOCRATIC UNION, THE UNITED CONSTRUCTION WORKERS ASSOCIATION, AND THE INDEPENDENT SKILLED TRADES COUNCIL, FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42(3), the Association for Union Democracy, Inc., the Northwest Ohio Chapter of Teamsters for a Democratic Union, the United Construction Workers Association, and the Independent Skilled Trades Council respectfully move for leave to file the accompanying brief in this case as *amici*. Neither petitioner nor respondent has consented to the filing of this brief.

The Association for Union Democracy, Inc., is a non-profit corporation registered in the State of New York in 1969. It was granted tax-exempt status by the Internal Revenue Service in 1971 and subsequently classified as a non-private foundation. The aim of the Association, as stated in its certificate of incorporation, is to further democratic principles and practices in American labor organizations, both by encouraging union members to participate actively in the internal life of their unions, and by protecting the exercise of their democratic rights within their unions. The Association was founded in the realization that no other organization devotes itself primarily to this objective.

The Association does not take sides in internal union disputes over policy, program, or candidates. It does, however, propose that the rivalries and antagonisms which arise in the labor movement, as in other social institutions, be resolved through democratic procedures and the due process of law.

The sponsors of the Association include former leaders of major unions, religious leaders, members of union public review boards, lawyers, and prominent educators in labor studies and labor law. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which help sustain democracy in our national life and that, if it is to serve this purpose, union leaders must be responsive to their members, and unions must be democratic and just in their internal life.

In the past, the Association has provided legal and other support in numerous union controversies involving the political involvement, and at times discharge, of union officers. Its experience in the area has led it to an appreciation of the great variety of such situations, and the necessity that legal regulation of this staff relationship respect the range of variety involved.

Teamsters for a Democratic Union ("TDU") is a national organization of rank and file Teamsters, created

out of the merger of PROD and TDU. It is a grassroots organization, with chapters throughout the United States and Canada. It seeks to return the union to membership control by encouraging greater membership participation, fighting for better representation of the members and working to improve the leadership and structure of the union. TDU's Northwest Ohio chapter includes members of the several local unions within Teamsters Joint Council 44, including Teamsters Local 20.

The chapter has not taken a position on the union presidential races between Omar Brown, who appointed the plaintiff business agents, and Harold Leu, who fired them. The chapter includes Leu supporters, Brown supporters, supporters of Martin Smith, a third candidate, and supporters of none of these. *Amicus* recognizes the need of elected officers to be able to appoint to union positions persons who will carry out the policies the membership elected them to advance. *Amicus* also believes, however, that permitting the president of a local union to summarily discharge any union official who dares to disagree with him concentrates too much political control in one man's hands, and threatens the ability of the membership to exercise democratic control of their union.

The United Construction Workers Association ("UCWA") was created by minority construction workers in Seattle to assure the implementation of the "hometown plan" promulgated pursuant to Executive Order 11246. *See* W. Gould, BLACK WORKERS IN WHITE UNIONS, 345-351 (1977). Having secured minority access to the construction unions, the UCWA has turned to the difficult task of assuring fair union representation of minority workers. It has found, however, that minorities face particular problems in securing attention to their needs by established leaders, and that it is important to have minority members included in the leadership if real progress is to be made. The rule of *Emporium-Capwell Co. v. Western Addn. Cmnty. Org.*, 420 U.S. 50 (1975), se-

verely limits their ability to exert political influence on employers outside the structure of collective bargaining; yet when their representatives in the union staff press actively for minority interests, they may be, and have been, removed from office. *Amicus* wishes to file in this case to urge the Court to pay heed to the special needs of minority workers to have protection for the rights of their representatives in the inner circles of the union.

The Independent Skilled Trades Council is a national organization of rank-and-file members of the United Automobile, Aerospace, and Agricultural Implement Workers Union working at skilled trades. It has for several years campaigned on contractual issues and for democratic rights within the union, using both litigation and political organizing tactics. Many of its members have been appointed or elected to offices in the union; several of these officers have been brought up on charges or summarily removed from office for disseminating their dissenting views.

Amici are concerned that this Court's resolution of this case take place against a full appreciation of the situations in which the problem presents itself. We show in our brief that effective realization of the national interests, which Congress hoped to further in protecting union democracy, requires careful distinction between union-appointed positions which may be filled by union leaders on the basis of political loyalty to themselves, and appointees whose independent political activity must be protected in the interest of effective union democratic processes. We show further that in individual situations the political discharge of appointed staff may be part of a plan to chill the exercise of democratic rights by union members, and that the ultimate resolution of this case should not preclude federal courts in other individual cases from protecting union staff in such situations.

Amici take no position on whether, after trial, defendants or plaintiffs should prevail in this case. However,

the legal principle applied by the courts below—a *per se* rule that appointed union officers may never challenge a discharge from office based on their exercise of free speech rights—threatens the institutional sources of effective opposition in American unions. On the record before the Court, summary judgment was inappropriate under the legal principles that should have been applied. Accordingly, *amici* seek leave to file a brief at this time to urge that the case be remanded for trial.

For these reasons, we respectfully request that this motion for leave to file a brief as *amici curiae* be granted.

Respectfully submitted,

ALAN HYDE
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY SCHOOL OF LAW
15 Washington Street
Newark, New Jersey 07102
(201) 648-5463

PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* is set forth at pages ii to iv of the foregoing motion for leave to file a brief as *amici curiae.*

STATUTORY PROVISIONS

§ 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), provides:

> **Freedom of speech and assembly.**—Every member of any labor organization shall have the right to

meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§ 102 of the LMRDA, 29 U.S.C. § 412, provides:

Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question which this Court granted certiorari to decide was narrowly phrased: whether the action of a victorious candidate for union office, removing his predecessor's appointees because of their support for the predecessor, is actionable under the Bill of Rights of Members of Labor Organizations.[1] This narrow question, however, presents but one aspect of a broader issue, whether the LMRDA protects appointed officials against

[1] Title I of the Labor-Management Reporting and Disclosure Act of 1959 (also cited as "LMRDA" or "Landrum-Griffin Act"), 73 Stat. 519, 29 U.S.C. § 411 *et seq.*

removal because of their exercise of Title I rights. Another issue lurks in the background—are elected officials protected against removal for such reasons?

Defendants have argued—and the courts below agreed—that unless union reformers are permitted to seal their victories by the wholesale discharge of the administrative apparatus that served the defeated incumbents, the reformers will be unable to take charge of the union, and the opportunity for effective membership control will be lost.

This appealing argument, however, is based on facts which are not typical in officer removal cases. For a variety of reasons, most union elections are not contested; those which are contested usually result in victory by the incumbents. Thus, officers are normally removed, not for supporting defeated incumbents, but rather for speaking out against the superiors who put them in office in the first place. In this case, the Court will promulgate an authoritative construction of the LMRDA which will govern both situations. And the effect of a rule, such as that applied by the courts below, that permits no cause of action for union officers dismissed because of their political expression, will be to eliminate the principal sources of effective criticism of union leadership and thus the chief hope for democratizing and reforming unions.

This brief begins by showing that the language of the statute forbids such a holding. There is no evidence that Congress intended a politicization of union staff. On the contrary, Congress plainly intended to foster union democracy, which cannot exist unless union leaders are legally restrained from converting all union employment into political patronage.

The daring Congressional strategy of fighting corruption in labor unions by encouraging internal union democracy requires that union opposition, to be effective,

not be denied access to what in particular cases may be the sole source of information, experience, and skill in running union affairs, namely the appointed staff. Unions lack the structural basis for a two-party system; thus, access to high office is obtained by promotion through a one-party hierarchy. History shows that only with some staff independence can union internal politics play the role which Congress envisaged, namely the constant monitoring and occasional challenging of incumbent leadership, in the interest of clean and democratic unionism. To hold otherwise is to condemn union opposition to marginality, incredibility, and ineffectuality, and thus deny the Congressional scheme of creating clean unions through legal protection of internal democracy.

Moreover, history reveals examples of political discharges of union staff as a way of chilling political opposition in the membership. To close the door of the federal courts to suits by such staff would deal a blow against Congressional purpose.

Under the *per se* rule announced by the Court of Appeals, no appointed staff member could obtain judicial scrutiny of his discharge. This rule would permit unions to require all employees of any kind to participate in internal union politics on behalf of incumbent leadership, at the risk of losing their jobs. Such a rule is plainly incompatible with Congressional purpose, and must be rejected.

Amici do not know whether plaintiffs or defendants will prevail at trial. The record, however, presents disputes about facts that are material under the principles of law that the lower courts should have applied. Accordingly, summary judgment was inappropriate; the decision of the Court of Appeals should be reversed and the case remanded for further proceedings.

ARGUMENT

I. THE PUBLIC INTEREST IN EFFECTIVE INTERNAL UNION DEMOCRATIC PROCESSES REQUIRES LEGAL PROTECTION OF SOME POLITICAL DISSIDENCE BY APPOINTED STAFF.

In this case, the fifteen business agents discharged by union president Leu for their support of his opponent were members of Local 20 of the International Brotherhood of Teamsters. As members, each had the right under § 101(a)(2) of the LMRDA "to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization . . . ." It is undisputed that exercising this right cost them their jobs. Although the business agents were not fined or expelled from the union, this discrimination based on their exercise of statutory rights operated as an infringement of those rights.[2] They were therefore entitled to bring an action under § 102 of the Act to secure appropriate relief.[3]

Not only does the language of the statute afford a clear protection against such infringements, but the legislative history fails to reveal any Congressional purpose to deny protection to union members who happen to be holding appointed staff positions. To the contrary, remarks in the Congressional debates reveal a consistent assumption that union officials would be among the potential plaintiffs under the Bill of Rights, an assumption

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[2] The discharge cannot be justified on the theory that selection for a union position is a "privilege" rather than a "right." *See Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

[3] Because § 102 provides a cause of action for Title I complaints, it is unnecessary to decide whether § 609 of the Act creates an alternative basis for a suit. *See* Note, *Union Members' Free Speech Guarantee: Does It Protect Against Discharge From Office?*, 29 BUFF. L. REV. 169, 177 (1980).

shared equally by those who supported this result[4] as well as those who sought, in specific ways not involved in this case, to limit it.[5]

However, neither the "plain meaning" of the statute, nor the scattered assumptions of individual members of Congress, provides a resolution of the question presented. Rather, the rights of appointed union officers must be determined by examining the purposes Congress hoped to achieve through the LMRDA, and deciding what treatment of the rights of union staff will best achieve the

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[4] 105 Congressional Record 4813 (daily ed., April 22, 1959), 2 NLRB, LEGISLATIVE HISTORY OF THE LMRDA 1105 (1959) (cited as NLRB, LEG. HIST.) (account by Sen. Mundt of Roy Underwood); 105 Cong. Rec. 5823 (daily ed., April 22, 1959), 2 NLRB, LEG. HIST. 1115 (letter from Professor Godfrey Schmidt to Sen. Kennedy, as read by Sen. Goldwater).

[5] 105 Cong. Rec. 14495 (daily ed., Aug. 13, 1959), 2 NLRB, LEG. HIST. 1667 (Rep. McCormack, discussion of union officers as plaintiffs under LMRDA § 101(a)(5)). This concern with union officers as potential plaintiffs under this section resulted in a limiting legislative history. Conference Report on S. 1555 (H.R. No. 1147), 86th Cong., 1st Sess., at 31 (1959); 1 NLRB, LEG. HIST. 935.

The instant case presents no issue of the applicability of the "due process" provisions of Section 101(a)(5), 29 U.S.C. § 411(a)(5), to the removal of the petitioner business agents from office. Some lower courts have held that the section has no applicability to removal from office, *e.g.*, *Machinists Grand Lodge v. King*, 335 F.2d 340, 341-343 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964). There is a substantial argument that the Conference Report represents a Congressional determination not to require standards of due process for a *suspension* from union office, on the assumption that a permanent *removal* would follow, and that the permanent removal *would* take place under the safeguards of Section 101(a)(5). See Rosenberg, *Interpretive Problems of Title I of the Labor-Management Reporting and Disclosure Act*, 16 INDUS. & LAB. REL. REV. 405, 427 (1963); Dunau, *Some Comments on the Bill of Rights of Members of Labor Organizations*, 14 N.Y.U. CONF. ON LABOR 77, 94 (1961).

In this case, the discharged business agents did not challenge the procedural aspects of their removal from office; consequently the issue need not be reached.

Congressional purpose. For although the text of the LMRDA and its legislative history are frequently (and famously) not easy to interpret, *see, e.g., Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968), the interests which Congress hoped to accommodate assuredly are. The Bill of Rights seeks to accommodate the national interest in the control of union corruption through the enhancement of effective internal democratic processes, particularly by limiting the ability of entrenched union leaders to build political machines that perpetuate their rule, and the unions' interest in effective functioning as institutions and in fidelity to their legal and contractual responsibilities.

A. The National Interest In Effective Union Internal Opposition Requires Protection For The Rights Of Union Members Who Hold Appointive Positions.

The rights granted union members in the Bill of Rights are not a sort of subsidy, granted in a spirit of benevolence. Nor are they designed to achieve some abstract balance of power between union members and leaders.

The rights granted union members in the Bill of Rights are an element of the Congressional strategy against "breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct . . . ." LMRA § 2(b), 29 U.S.C. § 401(b). *Cf. Wirtz v. Laborers Local 125*, 389 U.S. 477 (1968). Their construction must be as broad as is necessary to achieve this Congressional purpose.

The disclosures of corruption, racketeering, and abuse of power in some portions of American trade union movement provided ample basis for Congressional enactment of the LMRDA. Primary reliance was not placed on a massive increase in criminal sanctions nor ongoing administration or supervision by a federal regulatory

agency. Rather, Congress boldly decided to place principal responsibility on union members themselves to obtain control of their unions through democratic processes. Union members were given federally guaranteed rights to participate in union affairs, elect officers, and organize opposition. The members were given the tools to clean up their unions: Congress hoped that the threat of effective rank-and-file objections, or electoral opposition, would suffice to keep union leaders honest, responsive to the membership, and worthy of their trust.

In adopting this daring strategy, however, Congress faced a serious problem. For, as this Court observed in *Steelworkers Local 3489 v. Usery*, 429 U.S. 305, 310-311 and n. 7 (1977):

> In the absence of a permanent "opposition party" within the union, opposition to the incumbent leadership is likely to emerge in response to particular issues at different times . . .. The Secretary suggests that in most unions there is no such organized opposition, and that the pattern described in the text is indeed typical.

This creates a serious paradox for Congressional policy. Although clean, responsive unions might result from the presence or threat of electoral opposition, such opposition is lacking on a permanent or regular basis.[6] And

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[6] The structural reasons for this absence include large size and centralization of decision-making; the incumbents' control of means of acquiring information and communication of views; the lack of an independent judiciary and effective legislative branch which could be an institutionalized forum for debate; the lack of opportunity to gain the experience or specialized skills needed for union leadership, except as part of the incumbent administration; and the traditional union suspicion of factionalism, viewing it as a form of dual unionism. *See generally*, Lipset, *The Political Process in Trade Unions* 216-242, in Galenson and Lipset, LABOR AND TRADE UNIONISM (1960); McConnell, *Factionalism and Union Democracy*, 9 Lab. L.J. 635 (1958); Herberg, *Bureaucracy and Democracy in Labor Unions*, 3 ANTIOCH REV. 405 (1943).

although sporadic outbursts of disaffection of the sort described in *Local 3489* might suffice to keep some local leaders responsive, they could hardly perform that function for national union leaders, or even leaders in a local the size of Teamsters Local 20 with a membership of approximately 12,500.

The paradox is real, but not insoluble. In order to vindicate the Congressional policy of fighting union corruption through internal democracy, the structural sources of democratic opposition must be protected wherever it appears, in the interest of keeping leadership responsive. A most important source in many cases is among appointed union-member staff.

Studies of contested union elections are unanimous in their recognition of the crucial role of full-time union staff. "[T]he defeat of a top officer is, with few exceptions, also accompanied by a political split among important full-time officials, one of whom usually becomes the standard bearer for the opposition and the candidate who replaces the incumbent." Edelstein and Warner, COMPARATIVE UNION DEMOCRACY: ORGANISATION AND OPPOSITION IN BRITISH AND AMERICAN UNIONS 319 (1976). "[A]n elite challenger can often marshal sufficient union resources to offset the incumbent's elite support. The non-elite candidate, on the other hand, faces not only an opponent, but the resources of the union itself." James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. CIV. RTS. CIV. L. REV. 247, 265 (1978). "The benefits of elite support increase with the size of the electorate and the scale of campaigning, until at the national level non-elite disabilities are all but crippling. There the massive imbalance in resources in a non-elite election challenge ensures that such challenges will be rare and ineffectual." *Id.* 266. "While both sides [in the 1965 contest for president of the United Steelworkers of America] clearly understood that their attention had

to be placed on the internal organization of the union, they were equally convinced of the need for an *auxiliary* public-relations apparatus to push their candidacies." Herling, RIGHT TO CHALLENGE: PEOPLE AND POWER IN THE STEELWORKERS UNION 143 (1972) (emphasis supplied); *see also id.* 138 n.* ("The staff representatives could become the muscle of organization. . . .") *et seq.*[7]

It is not hard to see why this should be so. In this one-party system of the unions, the only way for concerned members to acquire information on union affairs, skills at running meetings or committees, or influence of any kind, is to move up through the existing hierarchy, frequently stopping in a staff position. This pattern is facilitated by the almost universal union practice of appointing staff from their own rank-and-file members. *See, e.g.*, Stieber, GOVERNING THE UAW 93 (1962); Herling, *supra*, at 120 (United Steelworkers); Cook, UNION DEMOCRACY: PRACTICE AND IDEAL 139 (1963); Edelstein and Warner, *supra*, at 15. In every defeat of an incumbent national union president, staff support for the challenge has been critical. *See, e.g.*, Herling, *supra*; Edelstein and Warner, *supra*, at 320-329 (International Union of Electrical Workers).

Indeed, for most successful national union candidates, staff support can be assumed. Most unions elect national officers at national conventions, McLaughlin and Schoomaker, THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY 24-26 (1979); James, *supra*, at 261 n. 49

[7] Similarly, in Local 20 there was a long period of rule by a political machine until 1974 when two members of the official family who held appointed jobs, Leu and Brown, ran against each other for the right to succeed to the position of a retiring president. Leu's election was overturned and Brown won in the rerun in 1975. Leu then used employer contributions to win the next regular election in 1977, *see Marshall v. Teamsters Local 20*, 611 F.2d 645 (6th Cir. 1980), although the remainder of Brown's slate was reelected. Two of these individuals were among the business agents fired by Leu. After the 1977 election was overturned, Leu won the rerun.

(citing sources); while the proportions vary among unions, it is customary for appointed staff to comprise a fairly high percentage of the delegates at these electoral conventions. James, *supra*, at 262 n. 52; Edelstein and Warner, *supra*, at 104; Herling, *supra*, at 316-317, 360-361 (1968 United Steelworkers Convention; four out of five staff representatives served as convention delegates), 401.[8] Even where business agents are originally elected by the membership, either to their staff positions or as delegates, they quickly identify their loyalties with the incumbent administration. Cook, *supra*, at 196-198; Edelstein and Warner, *supra*, at 101.[9] Thus, in many unions, a rule that staff positions are conditioned on political support of incumbent leadership is the equivalent of a rule that there can be no democratic opponent to the incumbents, for where the convention is dominated by staff, and the staff must be loyal to the incumbents, the right to run for office is a hollow joke.

Yet even where the staff does not actually participate in the election of officers, its ability to assist an opposition candidate is, in many cases, an essential ingredient of the opposition's credibility. There simply may be no other source of information on union finances, issues, or inner workings. To permit union leadership to deny these resources to all challengers is to doom democratic

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[8] The rule of the Oil, Chemical, and Atomic Workers which makes international officers and appointed staff ineligible to be convention delegates, Rothbaum, THE GOVERNMENT OF THE OIL, CHEMICAL AND ATOMIC WORKERS UNION, 54-56 (1962), is thought to be unique in American union practice. *Cf. id.*, vii-viii.

[9] In the union involved in this case, even this possibility has become theoretical for the time being. At its last convention, the International Brotherhood of Teamsters adopted a policy under which locals currently appointing their staff would be precluded from switching to elected staff. Proceedings of the 22d Convention, International Brotherhood of Teamsters, June 3, 1981, at 132-35. Thus, for the foreseeable future in this union, support for insurgent candidates must come, if at all, from appointed staff.

opposition to marginality and frustrate its ability to perform the role Congress assigned it.[10]

Protection for officers' exercise of free speech is particularly crucial for minority groups within the union, such as members of *amici* United Construction Workers Association and Independent Skilled Trades Council, whose interests may sometimes be in conflict with those of the majority of union members. This Court's decision in *Emporium-Capwell Co. v. Western Addn. Cmnty. Org.*, 420 U.S. 50 (1975), severely limits their ability to exert political influence outside the union structure and encourages them to seek vindication of their rights by working in coalition with other workers. But many of the real decisions are made, not by the membership in referenda or mass meetings, but by officers at headquarters. Indeed, as the Court recognized in *Musicians v. Wittstein*, 379 U.S. 171, 182 (1964), the union democracy which Congress sought to foster is primarily based on representation, not mass participation. A representative democracy, to be effective, requires that pluralism at the membership level be reflected at the leadership level as well, for it is very often there that coalitions among interest groups must be formed. *Amici* have found, unfortunately, that when members who have gained access, by election or by appointment, to union positions insist on pressing their constituents' views, these officials are often removed from office for their pains.

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[10] There remains in any individual case the possibility that staff wanting to assist an insurgent candidate might resign their staff positions and take their accumulated knowledge over to the other side. Whether this possibility is realistic depends sharply on the availability in any particular case of jobs in the trade to which staff might transfer while retaining union membership, as well as any contractual right they might have to reclaim jobs they left when first taking office. In this case, many of plaintiffs were unable to find work because of endemic unemployment in the trucking industry, and thus could not even retain their union membership because they were not "working at the trade."

Protection of officers' rights is thus necessary to maintain pluralism at the level at which it counts—the union headquarters—in order to promote the Congressional goals of fostering effective representation of all interests within the union, and of securing effective membership control of unions. We turn now to the limitations on officer speech that are appropriate in light of unions' countervailing interests.

B. A Union's Interest in Effective Functioning Permits Limitations on an Officer's Expression Only Pursuant to Reasonable Rules Needed to Protect Organizational Interests and to Implement Its Legal or Contractual Obligations.

Unions, too, have interests at stake in the conduct of its appointed staff. Congress recognized the importance of these interests and enacted a proviso to § 101(a)(2) to protect them. The proviso does not say that union leaders may use their official powers to eliminate effective criticism; rather it permits the enforcement of

> reasonable rules as to the responsibility of every member toward the organization as an institution and to his responsibility to refrain from conduct that would interfere with its performance of its legal or contractual obligations.
>
> 29 U.S.C. § 411(a)(2).

It is important to be precise about the union interest which Congress actually recognized, since there has been some tendency in the lower courts to overstate the unions' legitimate interests.[11] For example, some courts, in sug-

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[11] Courts have frequently quoted S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959) to the effect that judicial intrusion into internal union affairs should be minimized. *E.g., Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 471 n. 10. This is odd in light of this Court's express warning in the very same case, *id.* at 468 and n. 6, against reliance on isolated fragments of the LMRDA's legislative history. More importantly, however, the quoted language was offered as a justification for omitting any Bill of Rights for union members from S. 1555. This philosophy was repudiated by

gesting that the Bill of Rights of Members of Labor Organizations offers little or no protection to the officer discharged for political differences with the leadership, have analogized the union to a corporation or business enterprise.[12] The analogy is a poor one. There has been no Congressional determination that any public interest requires the protection of the right of corporate managers or workers to organize assemblies or to challenge corporate leaders in fair, federally regulated elections. Just this determination has been made in the case of labor unions.

This does not mean, of course, that appointed union staff are frozen into office and cannot be fired for cause. Rather, once it is shown that the firing was based, at least in part, on the appointee's political views or expression, the union should be entitled to show that the appointee would have been removed, for valid reasons, even absent the political motivation. This is similar to the rule that is applied to public employees. *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Only if the union cannot rebut the prima facie case of political motivation would the officer be entitled to reinstatement.

The union may also prevail by establishing that the officer's position was inconsistent with the particular kind of expression at issue. Of course, no national interest demands that unions tolerate staff obstruction of elected officials which renders the union incapable of performing its statutory obligation of fair representation of employ-

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Congress when it adopted, on the floor, the McClellan Amendment, 105 Cong. Rec. 6476 (daily ed., April 22, 1959), 2 NLRB, LEG. HIST. 1119, which, as further amended, 105 Cong. Rec. 6729 (daily ed., April 25, 1959), 2 NLRB, LEG. HIST. 1239, became the Bill of Rights of Members of Labor Organizations.

[12] *E.g., Sewell v. Machinist Grand Lodge*, 445 F.2d 545, 551 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972) ("All employees, whether they work for a union or a large commercial company, may be required at times to subordinate personal expression to the responsibilities of their employment.").

ees, National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a), or contractual obligations to employers or others. Labor-Management Relations Act, § 301, 29 U.S.C. § 185. The measure of this defense, however, is the specific interests identified in the proviso to § 101 (a)(2). Several considerations are involved in the application of this proviso.

1. The proviso requires that there be a "reasonable rule" which was violated. *E.g., Maceira v. Pagan*, 648 F.2d 8, 15 (1st Cir. 1981). Restricting political freedom is not a club to be brought out at convenient moments when a particular member has taken an unpopular stand. There must be some intra-institutional expectation that all members similarly situated, not just the particular officer, have foresworn the conduct in question.[13] Moreover, the existence of an established rule provides some indication that the union membership, and not just the firing authority, favored the restriction on expression.

2. Merely theoretical threats to the union as an institution or to its legal or contractual obligations will not suffice to warrant infringements of free speech rights. Rather, there must be a serious and immediate threat to the union's interests. *E.g., Stachan v. Weber*, 535 F.2d

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[13] The "due process" provisions of the Bill of Rights of Union Members, LMRDA, § 101(a)(5), 29 U.S.C. § 411(a)(5), normally permit, as a procedural matter, discipline on the basis of unwriten rules, *Boilermakers v. Hardeman*, 401 U.S. 233, 243-45 (1971). Nevertheless, punishment of speech under unwritten, vague or otherwise unreasonable rules may be *substantively* improper under the "free speech" provisions of LMRDA, § 101(a)(2), although proper under § 101(a)(5). *See, e.g., Bise v. IBEW Local 1969*, 618 F.2d 1299, 1304-1305 n.5 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980); *Semancik v. United Mine Workers Dist. 5*, 466 F.2d 144, 153 (3d Cir. 1972). This is analogous to the well-known principle of constitutional law that, because political expression is easily chilled, the regulation of speech must be accomplished through formal standards which eliminate official discretion and give clear notice of what is prohibited. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Kunz v. New York*, 340 U.S. 290 (1951).

1202 (9th Cir. 1976); *Keubler v. Cleveland Litho and Photo, Local 24-P*, 473 F.2d 359 (6th Cir. 1973). This is a variation on the standard rule under the First Amendment that infringement of free speech is unlawful absent an imminent threat of a likely harm that the government may legitimately prevent. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). As Chief Judge Lumbard said in one of the first officer removal cases,

> Congress . . . decided that the desirability of protecting the democratic process within the unions outweighs any possible weakening of unions in their dealings with employers which may result from the freer expression of opinions within the unions.
>
> *Sanzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir. 1963), *cert. denied*, 375 U.S. 946 (1964).

3. In order to be valid under the proviso, a rule must protect, not the interests of individual officers who happen to be in a position to exercise powers of removal, but rather the interest of the organization as an institution and its ability to fulfill legal and contractual obligations. Thus, a rule that is so framed as to be applied without discrimination between those who campaign for the winners in an election and those who oppose them, can more readily be justified than a rule that is limited to those who back losers.

For example, unions have the power to eliminate this entire problem by insisting rigorously that staff stay out of union elections. Unions could adopt strict rules under which endorsing or contributing to any candidate or participation in any campaign for union office would be grounds for discharge from an appointed staff position. Staff wishing to campaign would have to resign or take a leave of absence for the duration of the campaign. Under such internal union "Hatch Acts," [14] the resources, expertise, energies, and wallets of staff would be open neither to incumbents nor insurgents. This would be a

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[14] 5 U.S.C. §§ 7321 *et seq.*

major step toward creating effective internal democracy and would truly further the Congressional plan.[15]

For this reason the Court should be chary in declaring any sweeping "right" to electoral participation by staff. The decision in the instant case should not render such a union "Hatch Act" legally impermissible.

It is difficult to suppose that the 1959 Congress would for a moment have endorsed such a result. On the other hand, it cannot be maintained that Congress in 1959 *required* the adoption of internal union "Hatch Acts." The Court's resolution of this case must therefore accommodate the national interest in permitting credible elections in unions, while not foreclosing an individual union's decision to remove its staff from electoral politics.

4. Finally, the union's burden of justification is substantially higher where it depends on whether the appointee supported or opposed the officer who removed him. It must be shown that the appointee's position is such that the *organization's* institutional interests or legal obligations are seriously threatened by having the position occupied by a person who made the kind of statement involved.[16]

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[15] Unfortunately, *amici* are aware of no such union "Hatch Acts." Rather, the expectation appears universal, even in relatively clean and democratic unions, that staff will be available to assist the electoral campaign—of incumbent leaders. Unions thus recognize the political role of staff, but insist that this political freedom be exercised in only one direction—on behalf of the incumbents. This is not a "Hatch Act" but a hatchet act. It stands the LMRDA on its head by creating a vast pool of campaign resources available only to incumbent union officials.

[16] The fact that this case concerns a dismissal based on expression in a union election should not obscure the fact that officers have frequently been removed for statements of other kinds. *E.g., George v. Bricklayers*, 255 F. Supp. 239 (E.D. Wis. 1966) (removal for

Thus, valid restrictions on protected expression will be limited to top-level appointees who must be trusted to act with a high degree of independence and discretion. For example, in unions which elect a part-time executive board, which then appoints a full-time executive secretary or business manager, the full-time appointee becomes so powerful, and so able to influence policy despite the formal role of the executive board, that policy disagreements are an entirely sound reason for discharge. The justification for exacting conformity of political views decreases as one moves down the political ladder of the union hierarchy. For example, there may be less reason to restrict business agents' expression where, as in Local 20, the union president is a full-time officer who hires a full-time administrative assistant to help him supervise and control the business agents. And it is highly unlikely that personal loyalty to and political support of incumbents will be necessary to the job performance of teachers in an apprenticeship training program, members of a fair employment practices committee, or job stewards.

Sadly, no simple formula can describe for all cases the union appointees for whom personal political loyalty may be made a job requirement. Unions differ in internal organization; labels such as "secretary-treasurer," "business agent," or "job steward" lack uniform meaning. It will thus be necessary to determine the requisite extent of protection on a case-by-case basis.

The First Amendment provides a helpful analogy in determining what limits on free speech elected officials

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proposing constitutional amendments); *Witte v. Myers*, 343 F. Supp. 873 (W.D. Mich. 1971) (opposing apprenticeship program); *Cehaich v. UAW*, 496 F. Supp. 912 (E.D. Mich. 1980) (urging defeat of proposed contract); *Salzhandler v. Caputo*, 316 F.2d 445, 451 (2d Cir. 1963), *cert. denied*, 375 U.S. 946 (1964) (denunciation of embezzlement of union funds).

may appropriately demand of appointed employees. A public employee who disagrees with an elected official's policy may be in a good position to block the effectuation of programs which enjoy a popular mandate; mere expression of disagreement or criticism is not, however, sufficient to warrant dismissal. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Arguments that elected officials need to be able to fire supporters of their electoral opponents in order to be able to function effectively have been rejected. *Elrod v. Burns*, 427 U.S. 347 (1976). Rather, such limitations may only be imposed on employees where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980).[17]

In summary, then, Congress' objectives of controlling union corruption and assuring effective membership control of unions requires statutory protection for the rights of union appointees to express their views in support of or opposition to elected leaders. Although the unions' interest in effective functioning and in fulfilling their legal and contractual obligations permits the imposition of some restrictions on the political activities of some union appointees, removal from office is appropriate only when the union can show that the particular expression, coming from the particular appointee, was forbidden by a reasonable union rule and posed a serious threat to legitimate union interests under the proviso to § 101 (a) (2).

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[17] The First Amendment analogy should not obscure the specific problem presented. In particular, the one-party character of most union governments requires greater protection for dissident staff members than would be extended to public employees. The test, drawn from the proviso, must be whether treating the position as a patronage job is required by union's interests as an organization or its legal or contractual obligations.

II. COURTS SHOULD BE ALERT TO THE POSSIBILITY THAT DISCHARGES OF UNION STAFF ARE LIKELY TO INHIBIT MEMBERS' EXERCISE OF THEIR RIGHTS TO FREE SPEECH AND ASSEMBLY.

In its opinion granting summary judgment to the defendant officers in this case, the district court observed: "The evidence does not indicate that the firings were an attempt to stifle dissent in the union." *Navarro v. Leu*, 469 F. Supp. 832, 835 (N.D. Ohio 1979), *aff'd mem.*, 652 F.2d 58 (6th Cir. 1980). The reservation was well-advised. Several cases, particularly in the Second Circuit, have recognized the need to protect officers against removal which either is intended to inhibit dissent by rank-and-file members, or has that effect. *Newman v. Communication Workers Local 1101*, 597 F.2d 833 (2d Cir. 1979). *Amici* urge that, in deciding this case, the Court should not close the judicial doors to the allegation that, in any particular case, the discharge of particular staff infringes the rights of rank-and-file members.

It is by no means uncommon for the ax of repression to fall first on officers. For example, when Joseph Yablonski announced his candidacy in the 1969 election for President of the United Mine Workers, he was at the time Acting Director of the Labor's Non-Partisan League, the union's independently-controlled political affiliate. He was quickly removed from his job and exiled to the union's Pittsburgh district. *See Yablonski v. United Mine Workers*, 466 F.2d 424, 426 (D.C. Cir. 1972). On at least two occasions in the bitter history of the attempt to clean up District Council 9 of the International Brotherhood of Painters, a reformer elected as financial officer was removed from office by the Trial Board for what was later found to be protected speech, and declared ineligible for office. On both occasions the courts restored the officer to office. *Schonfeld v. Penza*, 477 F.2d 899 (2d Cir. 1973); *Salzhandler v. Caputo*,

supra. In the *Schonfeld* case, the court observed, 477 F.2d at 903-904, that the allegations had raised the question of "whether the sanctions on Schonfeld . . . impede or infringe upon the free speech or association rights of union *members* . . ." and noted that "federal courts need not necessarily wait to intervene until some sanction is directly imposed on union dissidents, for once suppressed 'the democratic spirit' within a union 'may not soon be revived,'" *quoting from Navarro v. Gannon*, 385 F.2d 512, 520 (2d Cir. 1967), *cert. denied*, 390 U.S. 989 (1968).

The test suggested in the previous section might well have protected union democracy in all these cases. In none of them was the officer dismissed under a "rule," reasonable or otherwise. In none did the union require that the demand for political support from officers in each position advance the union's performance of its legal obligations, or any other legitimate union interest. Indeed, Schonfeld and Salzhandler were each elected officers whose right of free speech should be well-nigh absolute.[18]

Nevertheless, there will be cases of reprisal discharges of appointed union staff, serving in positions for which a previously adopted union "reasonable rule" might normally make personal loyalty to the union president part of the job. In some individual cases, the discharge will

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[18] This case involves appointed staff, and the grant of *certiorari* spoke in terms only of appointed staff. It is therefore unnecessary to reach the question of whether, and under what circumstances, unions may adopt rules restricting the free speech or political participation rights of elected officials. *See, e.g., Maceira v. Pagan*, 648 F.2d 8 (1st Cir. 1981). Elected officials normally represent the interests of their constituents to labor or employer bodies, and therefore free speech is normally an inherent part of the understanding of the job. *Amici* find it difficult to imagine any circumstances under which removal of elected officials, solely for expression of views or other exercise of the rights of speech or assembly, would be proper; however, that question is not presented here.

be one of several actions rendering ineffectual the internal political dissent which Congress charged with the national task of creating honest unionism. The Court's resolution of the question presented in this case should be careful not to foreclose the possibility that federal courts might find, in other cases in which the issue is presented, that an officer's discharge was an infringement of the *members'* freedom of speech and assembly.

III. THE APPROACH OF THE COURT OF APPEALS INADEQUATELY PROTECTS THE NATIONAL INTERESTS AT STAKE; CONSEQUENTLY THE GRANT OF SUMMARY JUDGMENT MUST BE REVERSED AND THE CASE REMANDED FOR A HEARING UNDER A STANDARD WHICH ADEQUATELY ACCOMMODATES THE COMPETING INTERESTS.

From the foregoing analysis it follows that the judgment below must be reversed. The *per se* rule applied below, under which a union president could condition all union employment on personal support of him, creates a powerful weapon for the enforcement of conformity throughout a union and inadequately protects the national interest in permitting internal union democracy to flourish.

Nor is the record below adequate to support summary judgment under the standard that should have been applied. There is no hint that the union acted pursuant to a "rule" of any kind. Nor does the record show, aside from Leu's own stated belief that he needed "loyal" employees to carry out his programs, that having business agents who supported his predecessor posed a substantial threat to Leu's ability to lead the local and to meet its legal obligations. The discharges were not based on a neutral policy forbidding employees to participate in electoral campaigns, and the record provides only the barest details about the business agents' duties, and noth-

ing about a consequent inconsistency—or consistency—between their positions and their political expressions.

On remand, the district court should conduct an evidentiary hearing designed to resolve questions such as the following:

1. Were the discharges based solely on the business agents' campaign activities? If Leu had other reasons such as doubts about the agents' competence, would he have fired them in the absence of their protected activity?

2. Did the union have a rule requiring union employees to campaign for the winner in an election? Was it the expectation of the agents, or of the membership generally, that political loyalty to a defeated candidate could properly be grounds for discharge?

3. Did the business agents' support for Omar Brown in the 1977 election pose a serious threat to Local 20's institutional interests or its ability to fulfill its legal and contractual obligations? Or was the principal danger posed to Harold Leu's ability to persuade the union's executive board, all of whose other members had been elected on Brown's slate, to adopt and implement Leu's program?

4. Was Leu's complaint that the business agents had campaigned at all, or simply that they had not campaigned for him?

5. Do business agents perform such a sensitive job, and do they enjoy so much discretion and functional independence, that the elected officers could not effectively implement their policy decisions without having agents who agreed with their program in every respect? What is the business agents' role on the Local 20 Steward's Council? Do they dominate it, or are they only a few members of a large body? Are they expected in that role simply to represent the views of the elected leaders; or the independent interests of staff in their own right;

or the views of the portion of the membership that each serves individually? And how important a part of the agents' job is their service on the Council? [19]

IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed, and the case remanded to the district court for trial on the merits.

Respectfully submitted,

ALAN HYDE
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY SCHOOL OF LAW
15 Washington Street
Newark, New Jersey 07102
(201) 648-5463

PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for *Amici Curiae*

[19] In other cases there might be additional questions concerning the likely effect of the discharges on free speech and assembly among union members. It appears that the affidavits in the present case do not raise the issue here.